UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

ATLANTIC VEAL AND LAMB, LLC

Case No. 29-CA-272677

and

UNITED FOOD & COMMERCIAL WORKERS UNION, LOCAL 342

Matthew A. Jackson, Esq., for the General Counsel.
Martin L. Milner, Esq. (Simon & Milner), of Valley Stream, New York, for the Charging Party
Bryan T. Carmody, Esq. (Carmody & Carmody, LLP) of Glastonbury, Connecticut, for the Respondent

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge filed on February 11, 2021, by United Food & Commercial Workers Union, Local 342 (Local 342 or the Union), on July 20, 2021, the Regional Director, Region 29, issued an Amended Complaint and Notice of Hearing against Atlantic Veal and Lamb, LLC (Atlantic Veal or Respondent). The Complaint alleges that Atlantic Veal violated Sections 8(a)(1) and (5) of the Act by failing to provide the Union with requested information necessary for and relevant to the Union's performance of its duties as exclusive collective bargaining representative. The Complaint further alleges that Atlantic Veal violated Sections 8(a)(1) and (5) by laying off bargaining unit employees on about February 1, 2021 without providing the Union with notice and the opportunity to bargain. Atlantic Veal filed an Answer on July 31, 2021 denying the Complaint's material allegations.

This case was tried before me by videoconference on September 9 and 10, 2021.[1] On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by Counsel for the General Counsel (General Counsel) and Respondent, I make the following

[1] The Complaint was amended on the record to seek as a remedy that a representative of Atlantic Veal read the National Labor Relations Board Notice to Employees in English and Spanish to Respondent's employees during work time and in the presence of a Board agent, or in the alternative to have a Board agent read the Notice to Employees during work time in the presence of Atlantic Veal's supervisors. G.C. Ex. 1(l); Tr. 23-27.

Findings of Fact

I. Jurisdiction

Atlantic Veal, a corporation with a principal office located at 275 Morgan Avenue, Brooklyn, New York, has been at all relevant times engaged in the processing and packaging of meat products. Atlantic Veal admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Atlantic Veal also admits, and I find, that Local 342 is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

A. *The Parties*

Atlantic Veal operates a meat processing facility at its 275 Morgan Avenue location in Brooklyn, cutting down lamb and veal and preparing portions of meat, which it then packages for distribution. Tr. 42-43. After the portions of meat are boxed and wrapped, the product is moved to the distribution component of the facility, where it is labeled, placed on pallets and crates, and loaded onto trucks for delivery. Tr. 43.

After a representation election conducted on December 17, 2019, on April 15, 2020 the Regional Director, Region 29, certified Local 342 as the exclusive collective bargaining representative of the employees in the following bargaining unit:

> Including: All full-time and regular part-time processing and warehouse employees including wrappers, packers, meat cutters, sanitation, mechanics, maintenance, freezer, shipping, and receiving employees employed by the Employer.
>
> Excluding: All clerical employees, managers, agency employees, sales employees, professional employees, quality control employees, guards and supervisors as defined by the National Labor Relations Act.

Jt. Ex. 1, ¶ 1; Complaint ¶ 4. Atlantic Veal admits and I find that the above employees constitute an appropriate unit for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. The majority of the employees work in the production component of Atlantic Veal's operation, as opposed to distribution. Tr. 44.

Two representatives of Charging Party Local 342 – Ricardo Chavez and Dennis Henry – were called as witnesses by General Counsel. Chavez has been Assistant to the President of Local 342 since 2015, and works primarily on collective bargaining. Tr. 38. Henry has been a Local 342 organizer for seven years. Tr. 103. Henry organizes new members, assists with bargaining, and processes grievances on behalf of the Union. Tr. 103-104. Louis Sollicito is a lead bargainer for the Union, negotiating both initial and successor collective bargaining agreements, and reports directly to Local 342

President Deana Abondolo. Tr. 140-141. Atlantic Veal called Sollicito to testify on its behalf pursuant to Federal Rule of Evidence 611(c).

B. *Initial Bargaining and Layoffs in Spring 2020*

As discussed above, the Union was certified as exclusive collective bargaining representative on April 15, 2020.[2] In March 2020, prior to the certification, Atlantic Veal laid off at least 38 employees. Tr. 39-40; R.S. Ex. 1. On March 27, 2020, Phillip Peerless of Atlantic Veal sent a letter to the Union, entitled "Notice of Plant Closure," stating that, "effective April 30, 2020," Respondent would "close the processing and production operations" at the 275 Morgan Avenue plant, because "the sudden collapse of the restaurant industry" in the New York City area had "destroyed the Company's customer base." R.S. Ex. 1. Peerless stated that as of March 27, 2020, 38 employees had been or would be laid off, and that an additional 35 employees would be laid off on April 30, 2020. R.S. Ex. 1. The letter to the Union included a list of employees affected by the layoffs, together with their job titles, as well as copies of letters being sent to each individual affected employee. R.S. Ex. 1. Subsequently, on April 6, 2020, Respondent's attorney Bryan T. Carmody sent a letter to Local 342 Secretary-Treasurer Lisa O'Leary, stating that Respondent recognized the Union as the bargaining unit employees' exclusive collective bargaining representative. R.S. Ex. 2. Respondent also offered to begin negotiations "immediately" for a collective bargaining agreement, and regarding "the effects of the recent layoffs of represented employees and the future, expected layoff of other represented employees." R.S. Ex. 2.

The first negotiating session between the parties took place on April 27, 2020. Sollicito was the lead negotiator for the Union, and Carmody was the principal spokesperson for Atlantic Veal.[3] Tr. 141-142. During this session, Carmody stated that the closure of the processing and production operation remained scheduled for April 30, 2020. Tr. 187. The Union proposed that layoffs be conducted in seniority order, that the laid off employees receive one week of severance pay for each year of employment, and that Respondent continue health insurance for the laid off employees for three months. Tr. 187-188, 191-192. Sollicito testified that Carmody stated that he would discuss these issues with Atlantic Veal's management and respond at the next session. Tr. 190-191.

On April 28, 2020, Sollicito sent a letter to Carmody stating that the Union was prepared to begin negotiating for a collective bargaining agreement, and to negotiate "the effects of the lay off." R.S. Ex. 4. In his letter, Sollicito requested that Respondent provide information in connection with the negotiations. With respect to the impending layoff in particular, Sollicito requested that Atlantic Veal provide the following information:

[2] Henry testified that approximately 73 bargaining unit employees voted in the election conducted on December 17, 2019. Tr. 107.

[3] All negotiating sessions took place by conference call due to the impact of the COVID-19 pandemic. R.S. Ex. 4.

1. Does the employer still intend [to] cease its operations at the Brooklyn Location 275 Morgan Ave. Brooklyn, NY 11211 on April 30, 2020?

2. Does the employer still intend to cease its operation permanently at the above location?

R.S. Ex. 4. Sollicito also requested "A list of all business locations where the client processes food including addresses other than Morgan Ave Brooklyn location," and asked that Atlantic Veal "Advise if the employer is conducti[ng] layoffs in any of their other locations." R.S. Ex. 4. Sollicito requested financial documentation establishing the decline in business which necessitated the upcoming layoffs. R.S. Ex. 4. Finally, Sollicito requested information regarding the identities, work performed, and benefits available to the bargaining unit employees. R.S. Ex. 4. Sollicito testified that the Union did not demand bargaining regarding the decision to lay off employees effective April 30, 2020 because the Union was unsure, as evinced by the first question in his letter, as to whether those layoffs would actually take place. Tr. 189-191.

Atlantic Veal did not in fact lay off any production and processing employees on April 30, 2020. Tr. 220-221. Respondent did not lay off any bargaining unit employees after March 30, 2020 until the January 29, 2021 layoffs which are the subject of the Complaint's allegations. Tr. 220-221. In addition, Atlantic Veal has never ceased all production activities at its Brooklyn facility. Jt. Ex. 2, ¶ 3. Although all of the six employees laid off on January 29, 2021, and named in the Complaint,[4] were originally slated for layoff on April 30, 2020, none were actually laid off at that time. G.C. Ex. 4; R.S. Ex. 1.

On May 5, 2020, Carmody responded to Sollicito's April 28, 2020 letter. R.S. Ex. 6. In his letter, Carmody stated that "The Employer still intends to cease production and processing operations, but not before roughly May 30, 2020," and that the closure of these operations would be "permanent." R.S. Ex. 6. Carmody further stated that the request for financial documentation contained in Sollicito's letter was "overly broad," and that information regarding its customers and vendors was "not relevant." R.S. 6. In response to Sollicito's requests for information regarding other processing locations, Carmody stated that, "275 Morgan Avenue, Brooklyn, New York is the only location where the Employer processes food," and that "The Employer does not have any employees assigned to any" other "work location." R.S. Ex. 6. Sollicito testified that at that point he believed, based on Carmody's letter, that the closure and consequent layoffs would take place on or around May 30, 2020. Tr. 195-196.

The next negotiating session took place on May 6, 2020. At this session, Carmody reiterated that the closure of the production and processing operations would not take place until May 30, 2020. Tr. 212-213. Sollicito testified that early in the negotiations, Carmody had stated that while the company intended to close its production and processing operation in Brooklyn, it planned to continue its distribution

[4] Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias.

operations. Tr. 149. Sollicito testified that he asserted, based on information obtained by Local 342's organizing department, that Atlantic Veal had a facility in Ohio, and also asked whether Respondent had a location in Pennsylvania. Tr. 142-143. At the May 6, 2020 session, Carmody stated in response that Atlantic Veal did not have a location in Ohio, and that Respondent's facility in Pennsylvania had shut down. Tr. 150-151, 194-195. Carmody also rejected the Union's proposals regarding severance pay and health insurance coverage for the employees who would be affected by the upcoming layoff. Tr. 195-196.

The next negotiating session took place on May 27, 2020. At this session, Carmody told the Union that Respondent's plans regarding the closure of production and processing had changed. Tr. 161-162. Carmody stated that Atlantic Veal now intended to maintain its case-ready operation in Brooklyn, which butchers, cuts, and packages meats for sale at retail locations. Tr. 162. Sollicito testified that based upon Carmody's statements that at the time the production and processing operation would remain open, he believed that the closure and layoffs Respondent had discussed earlier were not going to occur. Tr. 213.

During the spring of 2020, some bargaining unit employees who had been laid off in March informed the Union that they had been recalled to work. Tr. 214. After Sollicito learned of the recalls, he raised the issue with Carmody during negotiations. Tr. 214-215. Sollicito testified that he asked Carmody whether Atlantic Veal intended to recall all of the bargaining unit employees it had laid off in March 2020 as the pandemic subsided. Carmody stated that at that point he did not know. Tr. 215.

C. *Bargaining, Information Requests, and Layoffs in Late 2020 and early 2021*

Although bargaining continued, the subject of possible layoffs of bargaining unit employes did not arise again until late fall of 2020, when the parties met for negotiations on December 17, 2020. Sollicito did not attend this session due to health issues, so Chavez represented the Union along with Daniel Gorman, an employee in the Union's contracts department who took notes, and Union attorney Martin Milner. Tr. 41-42, 167-168. Carmody attended for Atlantic Veal. Tr. 42. The parties discussed various proposals that had been exchanged during the previous months. Tr. 42.

Chavez testified that at some point during the meeting, Carmody stated that another layoff would take place during the first quarter of calendar year 2021, in February or March 2021, which would affect the bargaining unit production and processing employees. Tr. 42, 65-68. Carmody stated that Atlantic Veal again intended to permanently close the production component of the business, while continuing its distribution operations. Tr. 42, 43-44. Chavez asked Carmody whether Atlantic Veal would notify the employees and the Union of the layoffs pursuant to the Worker Adjustment Retraining and Notification (WARN) Act, as it had done in the past, and Carmody stated that Respondent would do so if necessary. Tr. 44. Milner then asked Carmody where the product would be produced and who would be producing it if production and processing shut down, noting that if Atlantic Veal intended to maintain its

distribution operation it would need to somehow obtain product to distribute. Tr. 44-45. Carmody responded that he did not know and would find out, but also contended that the Union was not entitled to that information. Tr. 45, 69-70. Milner stated that he disagreed with Carmody, and believed that the Union was entitled to information regarding the origins of the product that Atlantic Veal would be distributing. Tr. 45, 70-71.

The Union did not demand bargaining regarding Atlantic Veal's decision to lay off bargaining unit employees at the December 17, 2020 negotiating session, nor did the Union submit proposals in connection with any upcoming layoff of employees. Tr. 68-69.

The next session took place on January 7, 2021. Chavez, Gorman, Milner, and Sollicito attended this session for the Union, and Carmody represented Atlantic Veal. Tr. 45-46. During this session the parties discussed a number of proposals pertaining to the collective bargaining agreement. Tr. 46. At some point, the Union raised an issue regarding new machines at the Morgan Avenue facility, based upon reports from the bargaining unit employees that there were new machines in the facility wrapped in plastic, which resembled machines used for production and processing. Tr. 47. The Union representatives asked what the machines would be used for, and whether Atlantic Veal was going to continue production and processing at the Morgan Avenue facility. Tr. 47. Carmody stated that the new machines were not in use at the Morgan Avenue facility. Tr. 73. Carmody also stated that Respondent was still planning to shut down its production and processing operation. Tr. 48.

The Union then asked for an update regarding the status of the planned shutdown of production and processing. Tr. 48. Chavez asked again whether Atlantic Veal planned on implementing the WARN Act and notifying the Union "if and when this happens." Tr. 48-49. Carmody responded that Atlantic Veal was still planning to shut down the production and processing operation at some point, but he had no additional information. Tr. 49, 74. The Union did not demand that Atlantic Veal bargain regarding the decision to lay off bargaining unit employees at this session, or submit proposals in connection with any upcoming layoff of employees. Tr. 74-75.

At that point, Sollicito believed that Atlantic Veal had placed the parties in a "holding pattern" with respect to anticipated layoffs which could be delayed indefinitely, as had been the case in the spring of 2020. Tr. 217. Sollicito also believed that Respondent's plans with respect to the production and processing operation may have changed, based upon his understanding that a case-ready facility could be established and operating in 30 days. Tr. 218. Sollicito therefore sent Carmody a letter requesting information on January 14, 2021, by e-mail and regular mail. Jt. Ex. 1, ¶ 2; G.C. Ex. 2; Tr. 49-52. Sollicito's January 14, 2021 letter, received by Carmody on January 19, 2021, states as follows:

> As discussed during bargaining calls on December 17, 2020 and again January 7, 2021, you indicated Atlantic Veal would allegedly be

> conducting a shutdown of the production portion of the facility during the first quarter which would likely result in more layoffs, however, the distribution portion of the business would continue operating.
>
> At this time Local 342 is requesting the employer provide details as to what company or companies will be performing the production that is currently taking place on premise[s] once the shutdown is complete as well as where those companies are located.

Jt. Ex. 1, ¶ 2; Tr. 52. The evidence establishes that the Union never received a response to its January 14, 2021 information request. Tr. 52-53.

The parties next met for negotiations on January 21, 2021, with Chavez, Milner and Gorman representing the Union and Carmody representing Atlantic Veal. Tr. 53-54. After a discussion regarding proposals for the collective bargaining agreement, Carmody confirmed that he had received Sollicito's January 14, 2021 letter requesting information, and stated that he would respond promptly and in writing. Tr. 54, 75-76, 84. The Union representatives asked for any additional information or changes in the employer's stated plan to shutdown the production and processing operation and lay off employees. Tr. 54-55. Carmody stated that he had no new information, but that he would let the Union know if he had any updates. Tr. 55, 84-86.

On January 29, 2021, Atlantic Veal laid off the six bargaining unit employees named in the Complaint's allegations – Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias. Jt. Ex. 2, ¶ 1-2. There is no evidence that Sollicito, Chavez, or any other representative of Local 342 was notified by Respondent before the layoff took place. Tr. 58, 221. Instead, the Union learned of the layoffs when the employees contacted them in early February 2021. Tr. 56-58, 59, 107-109, 111. Henry testified that he contacted all of the laid off employees personally to determine that they had been discharged. Tr. 111-113. He then notified Sollicito and organizing director Liz Fontanez by e-mail. G.C. Ex. 3; Tr. 120-123. Subsequently, two of the employees laid off on January 29, 2021 – Magdaleno Garcia and Ramon Taveras Arias – were recalled to work on April 19, 2021 and April 27, 2021, respectively. G.C. Ex. 4.

Since January 2021, Local 342 and Atlantic Veal have continued their negotiations for an initial collective bargaining agreement. Jt. Ex. 1, ¶ 1. The parties have stipulated that no bargaining impasse currently exists in connection with the negotiations, and that no impasse existed at any time in either January or February 2021. Jt. Ex. 1, ¶ 1.

Decision and Analysis

A. Preliminary Issues Involving Atlantic Veal's Affirmative Defenses

Before turning to the specific violations alleged in the Complaint, I will address certain affirmative defenses raised by Atlantic Veal in its Amended Answer. Atlantic Veal contends that the Acting General Counsel and General Counsel lacked authority to issue the Complaint and prosecute the instant case. Atlantic Veal further asserts that the Complaint's allegation that it unlawfully refused to provide information is precluded because the underlying unfair labor practice charge was filed outside of the six-month period set forth in Section 10(b) of the Act. Both of these contentions are rejected for the reasons discussed below.

Atlantic Veal asserts in its Answer and its Post-Hearing Brief that the former Acting General Counsel, Peter Sung Ohr, lacked authority to issue and prosecute the Complaint in this case, because the agency's preceding General Counsel, Peter Robb, was unlawfully removed before his term of service ended.[5] In its Post-Hearing Brief, Respondent also asserts that the current General Counsel, Jennifer Abruzzo, lacked authority to prosecute the Complaint on this basis. Atlantic Veal's contentions in this regard are rejected. On December 30, 2021, the Board determined in *Aakash, Inc. d/b/a Park Central Care and Rehabilitation Center*, 371 NLRB No. 46 at p. 1-2, that the President had authority to remove former General Counsel Robb pursuant to *Collins v. Yellen*, ___ U.S. ___, 141 S.Ct. 1761 (2021), and rejected arguments that Acting General Counsel Ohr and General Counsel Abruzzo lacked the authority to issue and prosecute the complaint in that case as a result.[6] However, although the respondent in *Park Central Care and Rehabilitation Center* contended that Acting General Counsel Peter Ohr lacked authority to issue the complaint, the charge had been investigated, and the complaint issued and prosecuted, by General Counsel Abruzzo. *Park Central Care and Rehabilitation Center*, 371 NLRB No. 46 at p. 1, fn. 2. Subsequently, on February 1, 2022, the Board rejected a contention that Acting General Counsel Ohr lacked authority to prosecute a complaint as a result of the purportedly improper removal of former General Counsel Robb in *Wilkes-Barre General Hospital*, 371 NLRB No. 55 at p. 1, fn. 2, and see p. 4 and 10. The Board further held in that case that the respondent's argument regarding Acting General Counsel Ohr's lack of authority was rendered moot by General Counsel Abruzzo's two ratifications of the issuance and prosecution of the complaint in that case – the first after she was confirmed and sworn

[5] Atlantic Veal's Answers, filed on June 23, 2021 and July 31, 2021, allege that Acting General Counsel Ohr "lacks the authority to prosecute the Complaint and any actions taken by or on behalf of Mr. Ohr are *ultra vires*." G.C. Ex. 1(F, K). Atlantic Veal's Amended Answer, filed on September 8, 2021, alleges that Acting General Counsel Ohr lacked authority to issue the Complaint "and any attempt to prosecute the Complaint is *ultra vires*." G.C. Ex. 1(N).

[6] In *Park Central Care and Rehabilitation Center*, 371 NLRB No. 46 at p. 1, the Board stated, "Respondent contends that neither Acting General Counsel Peter Ohr nor General Counsel Jennifer Abruzzo had the authority to issue and prosecute the complaint…as a result of the President's purportedly unlawful removal of former General Counsel Peter Robb. We reject the Respondent's contentions."

in and the second after former General Counsel Robb's term would have expired absent his removal. *Wilkes-Barre General Hospital*, 371 NLRB No. 55 at p. 1, fn. 2.

Although Post-Hearing Briefs in the instant case had already been submitted when the Board issued its Decisions in *Park Central Care and Rehabilitation Center* and *Wilkes-Barre General Hospital*, I provided the parties with a specific opportunity to address the Board's holdings, and the parties submitted letter briefs on January 14, 2022 and February 8, 2022. In its January 14, 2022 letter brief, Atlantic Veal contends that the Board's Decision in *Park Central Care and Rehabilitation Center* was arbitrary and capricious. In its February 8, 2022 submission, Atlantic Veal argues that I should defer to the federal courts with respect to the issue, which implicates the President's authority. However, as an Administrative Law Judge, I am bound to follow Board precedent that the Supreme Court has not overruled. *Pathmark Stores, Inc.*, 342 NLRB 378, fn. 1 (2004), quoting *Iowa Beef Packers, Inc.*, 144 NLRB 615, 616, enf'd in part 331 F.2d 176 (8th Cir. 1964); *Los Angeles New Hospital*, 244 NLRB 960, 962, fn. 4 (1979), enf'd. 640 F.2d 1017 (9th Cir. 1981). Thus, pursuant to the Board's decisions in *Park Central Care and Rehabilitation Center* and *Wilkes-Barre General Hospital*, Atlantic Veal's contention that Acting General Counsel Ohr and General Counsel Abruzzo lacked authority to issue and prosecute the Complaint in the instant case is rejected.[7]

Atlantic Veal further contends in its Amended Answer and argues in its Post-Hearing Brief that the Complaint's allegation that Respondent unlawfully refused to provide information is time-barred, because the unfair labor practice charge upon which it is based was filed outside of the Section 10(b) period. See Tr. 8-12. The charge, filed on February 11, 2021, alleges that Atlantic Veal violated Sections 8(a)(1) and (5) of the Act by failing to provide information requested by the Union on December 17, 2020 regarding the source of the product being distributed from the Morgan Avenue facility. Respondent asserts that the Union made "substantially the same information requests" on April 28, 2020 and May 8, 2020, outside of the Section 10(b) period. The Union's May 8, 2020 information request, contained in an e-mail from Sollicito to Carmody, sought information regarding the identity and ownership of any entity from which Respondent intended to obtain meat products for distribution from its Morgan Avenue facility after the production and processing operation at that location shut down. R.S.

[7] I note that in the instant case, as in *Wilkes-Barre General Hospital*, General Counsel Abruzzo issued a Notice of Ratification on December 20, 2021, after she was sworn in a second time and former General Counsel Robb's term would have expired in any event, ratifying the issuance of the Complaint and the prosecution of the instant case. 371 NLRB No. 55 at p. 1, fn. 2. Atlantic Veal's December 27, 2021 request that I decline to consider General Counsel Abruzzo's December 20, 2021 Notice of Ratification is rejected. There is no indication in *Wilkes-Barre General Hospital*, or any of the cases cited therein, that a motion to reopen the record was required in order for me to consider the Notice of Ratification, as Respondent contends. 371 NLRB No. 55 at p. 1, fn. 1; see also *Wilkes-Barre Hospital*, 362 NLRB 1212, 1212 fn. 1, 1215-1216 (2015), enf'd. in relevant part 857 F.3d 364, 371-372 (D.C. Cir. 2017); *RTP Co.*, 334 NLRB 466, 466 fn. 1 (2001), enf'd. 315 F.3d 951 (8th Cir. 2003); *NLRB v. Newark Electric Corp.*, 14 F.4th 152, 161-163 (2d Cir. 2021); *Midwest Terminals of Toledo International, Inc. v. NLRB*, 783 Fed.Appx. 1, 6-7 (D.C. Cir. 2019); *Advanced Disposal Services East, Inc. v. NLRB*, 820 F.3d 592, 597-602 (3rd Cir. 2016). Furthermore, Atlantic Veal has provided no legal authority in support of its argument that a motion to reopen the record was required.

Ex. 7, p. 3. However, the Board has held that "each information request and each refusal to comply gives rise to a separate and distinct violation of the Act," such that previous requests for information outside the Section 10(b) period are immaterial to the timeliness of the request which is the subject of a complaint's allegations. *Teachers College, Columbia University*, 365 NLRB No. 86 at p. 5 (2017), enf'd. 902 F.3d 296 (D.C. Cir. 2018), quoting *Centinela Hospital Medical Center*, 363 NLRB 411, 412, fn. 6 (2015). The refusal to provide information allegation contained in the instant charge, filed on February 11, 2021, is premised upon the Union's December 17, 2020 information request, reiterated by Sollicito in writing on January 14, 2021, and was therefore filed well within the Section 10(b) period. As a result, Atlantic Veal's contention that the allegations pertaining to an unlawful refusal to provide information are untimely pursuant to Section 10(b) is without merit.

B. *The Alleged Refusal to Provide Information*

The Complaint alleges that Atlantic Veal violated Sections 8(a)(1) and (5) of the Act by refusing to provide information – requested by the Union at negotiations on December 17, 2020 and in writing on January 14, 2021 – regarding the identity and location of companies which would be producing the product for distribution in the event that Respondent closed the production and processing operation at the Morgan Avenue facility. In his Post-Hearing Brief, General Counsel argues that Atlantic Veal's failure to provide the requested information was unlawful, in that the requested information was relevant to assertions made by Respondent during negotiations, useful in order for the Union to formulate and respond to bargaining proposals, and obviously pertinent given the context of negotiations for a first contract and impending layoffs. Atlantic Veal contends that it was not required to provide the requested information, because the Union failed to establish its relevance.

An employer's duty to bargain pursuant to Section 8(a)(5) of the Act encompasses a duty to provide information requested by a union which is relevant and necessary for the union's performance of its duties as collective bargaining representative. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956); *NLRB v. Acme Industrial Co.*, 385 U.S. 422, 435-436 (1967). Information pertaining to the bargaining unit employees is "presumptively relevant," and must be provided by the employer. See, e.g., *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71 at p. 2 (2019); *Disneyland Park*, 350 NLRB 1256, 1257 (2007). However, information which does not pertain to the bargaining unit employees is not presumed relevant. Instead, the Board applies a broad "discovery-type standard" to determine whether the union has established sufficient relevance to require that an employer provide the requested information. *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71 at p. 2; *Disneyland Park*, 350 NLRB at 1258. Thus, the Board has characterized the union's burden in this regard as "not an exceptionally heavy one," requiring only that the union demonstrate a "probability that the desired information is relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities." *SBC Midwest*, 346 NLRB 62, 64 (2005); *Public Service Electric & Gas Co.*, 323 NLRB 1182, 1186 (1997), enf'd. 157 F.3d 222 (3rd Cir. 1998), quoting *NLRB v. Acme Industrial Co.*, 385 U.S. at 437. In addition, the

employer may be required to provide information which is not presumptively relevant when its relevance "should have been apparent…under the circumstances."[8] *Disneyland Park*, 350 NLRB at 1258, citing *Allison Corp.*, 330 NLRB 1363, 1367, fn. 23 (2000).

The evidence here establishes that the information requested by the Union during negotiations and in Sollicito's January 14, 2021 letter – the identity and location of entities which would be producing the product that Atlantic Veal intended to distribute from its Morgan Avenue facility after its own production operations shut down – was relevant and would have been useful to the Union in the performance of its duties as collective bargaining representative. The Board has found that information regarding non-bargaining unit employees may be pertinent to "assess claims made by the employer relevant to contract negotiations." *Audio Visual Services Group, Inc. d/b/a PSAV Presentation Services*, 367 NLRB No. 103 at p. 5 (2019), enf'd. 957 F.3rd 1006 (9th Cir. 2020), quoting *Caldwell Mfg. Co.*, 346 NLRB 1159 (2006); see also *Caldwell Mfg. Co.*, 346 NLRB at 1159, and see fn. 3, 1159-1160, 1166, 1167, 1170 (information regarding "material costs, labor costs, manufacturing overhead, productivity calculations, competitor data, and data on possible new production" relevant to permit union to evaluate employer's "specific factual assertions" regarding the facility's "less-competitive" status and other "bargaining claims"). The Board has further determined that information not directly pertaining to bargaining unit employees may be relevant to the Union's responsibilities in terms of conducting negotiations, specifically with respect to formulating and responding to bargaining proposals. See, e.g., *Caldwell Mfg. Co.*, 346 NLRB at 1169, and at 1160 (information relevant given the "probability" of its usefulness "to the Union in deciding what proposals to accept and make"); *Kolkka Tables & Finnish-American Saunas*, 335 NLRB 844, 872 (2001) (information regarding plans to subcontract work necessary for the union to "prepare for collective bargaining"); *Leland Stanford Junior University*, 262 NLRB 136, 152 (1982), enf'd. 715 F.2d 473 (9th Cir. 1983) (information relevant where necessary for the union to "fashion realistic contract proposals"). Finally, information regarding non-bargaining unit employees, particularly information regarding subcontracting, may be relevant to the Union's effective preservation of the work of the bargaining unit which it represents. See *West Penn Power Co.*, 339 NLRB 585, 586 (2003), enf'd. in relevant part 394 F.3d 233 (4th Cir. 2005) (information relevant to "Union's concerns with the maintenance of unit size and the general preservation of unit work"); *Detroit Edison Co.*, 314 NLRB 1273, 1275 (1994) (union's "representational responsibilities…encompass... continual monitoring of any threatened incursions on the work being performed by bargaining unit members");

[8] Atlantic Veal contends that an employer should not be required to provide information which does not directly pertain to the bargaining unit employees based upon a showing that the information's relevance should have been apparent under the circumstances, referring to *McLaren Macomb*, 369 NLRB No. 73 (2020). In that case, two Board members indicated that they would be open to reconsidering this precept in the future. *McLaren Macomb*, 369 NLRB No. 73 at p. 1, fn. 1. However, Respondent does not provide any binding authority for the proposition that an employer is no longer required to provide information which is not presumptively relevant on such a basis. As an Administrative Law Judge, I am bound to follow Board precedent that the Supreme Court has not overruled. *Pathmark Stores, Inc.*, 342 NLRB at 378, fn. 1 (2004), quoting *Iowa Beef Packers, Inc.*, 144 NLRB at 616. Thus, I will not reevaluate the continued viability of this doctrine.

Island Creek Coal Co., 292 NLRB 480, 490, fn. 18 (1989), enf'd. 899 F.2d 1222 (6th Cir. 1990) ("Without question, information concerning subcontracting of unit work is relevant to a union's performance of its representational functions"). The record evidence in this case establishes a probability that the information regarding the identity and location of the entity which would provide the product that Atlantic Veal intended to distribute from its Morgan Avenue facility after production and processing closed would have been useful to the Union in all three respects.

As Sollicito explicitly stated in his January 14, 2021 letter, the information at issue here was requested in connection with Carmody's representations during the December 17, 2020 and January 7, 2021 negotiating sessions that Atlantic Veal intended to shut down its production operation during the first quarter of 2021, resulting in the layoff of bargaining unit employees, while maintaining its distribution operation at the Morgan Avenue facility.[9] Jt. Ex. 1, ¶ 2. As Milner had elaborated to Carmody at the December 17, 2020 session, if the distribution operation was to remain open after production was shut down, Atlantic Veal would necessarily be obtaining the product it distributed – which the bargaining unit employees were then producing – from another company and/or location. Tr. 44-45, 70-71. The Board has repeatedly found that where subcontracting or other business dealings affect the work of the bargaining unit employees, information regarding such arrangements is relevant to the union's performance of its duties as exclusive collective bargaining representative. See, e.g., *Kauai Veterans Express Co.*, 369 NLRB No. 59 at p. 2, 5-6, 10 (2020) (identity and activities of separate corporate entity relevant to "ascertain whether non-unit employees had been performing bargaining unit work"); *Earthgrains Co.*, 349 NLRB 389, 393-395 (2007), enf'd. in relevant part 514 F.3d 422 (5th Cir. 2008) (information regarding "the precise identity and location of the subcontractor" a "necessary predicate" to determining whether non-bargaining unit employees were performing bargaining unit work); *Allison Corp.*, 330 NLRB at 1364 fn. 8, 1367-1368 (names and addresses of companies from which employer imported products, together with products ordered and amounts paid, relevant to determine the "impact on the bargaining unit" of the imports and "what future effects upon the bargaining unit could be anticipated"). In such circumstances, the employer is required as part of its bargaining obligation to produce information relating to its representations during bargaining regarding business arrangements affecting bargaining unit work. See *Caldwell Mfg. Co.*, supra; *Allison Corp.*, 330 NLRB at 1363-1364, 1367-1368 (subcontracting information relevant given employer's statements during negotiations associating subcontracting with bargaining unit layoffs).

Information pertinent to Carmody's representations regarding the closure of the production and processing operations at Morgan Avenue was particularly critical in the context of the negotiations at issue here. For the record demonstrates that Atlantic Veal's repeatedly mutating representations regarding the closure of production and processing were unreliable. From the period of time before the Union was certified,

[9] Atlantic Veal's contention that the Union failed to explain why the information was necessary other than to state that it was probative of Respondent's motivation in determining whether to shut down the production operation is therefore inaccurate. R.S. Post-Hearing Brief at 11.

Atlantic Veal had been claiming that it intended to close the production and processing operation at the Morgan Avenue facility. Since late March 2020, Respondent had been representing to the Union that production and processing would close – first as of April 30, 2020, then as of May 30, 2020, then at some future point – before stating in December 2020 that the closure would take place in the first quarter of 2021. In addition, Atlantic Veal had occasionally qualified its predictions regarding a complete closure of production and processing, as when Carmody stated at the May 27, 2020 session that the production operation would not in fact close entirely, and that Respondent's case-ready operation would continue to function. Despite these various prognostications, the record establishes that the production and processing operation has never been shut down, and in fact it remained functioning at the time of the hearing. In this context, it was entirely reasonable for the Union to inquire, after Carmody represented on December 17, 2020 that distribution operation at the Morgan Avenue facility would continue after production and processing shut down, as to where and how Atlantic Veal would obtain the product to distribute, which was then being produced by the bargaining unit employees.

The record further demonstrates that throughout the period that Atlantic Veal was claiming that it intended to shut down the production and processing operation, the Union was obtaining information from the bargaining unit employees which contradicted this assertion. For example, the Union learned that some of the production employees laid off in March 2020 were recalled later that spring. Tr. 214. In addition, Atlantic Veal initially informed the Union that the six employees laid off on January 29, 2021 and named in the Complaint would be laid off on April 30, 2020, but none were actually laid off at that time. G.C. Ex. 4; R.S. Ex. 1; Tr. 220-221. Bargaining unit employees also reported that new machines, which resembled machines used for production and processing, had appeared at the Morgan Avenue facility. Tr. 47. However, when the Union raised this with Carmody at negotiations on January 7, 2021, Carmody stated only that the new machines were not being used at the Morgan Avenue facility, and that Respondent still intended to close its production and processing operations there. Tr. 47-48, 73. Based upon the Union's ongoing discovery of practical information which contradicted Atlantic Veal's representations, and Respondent's continually shifting claims regarding the fate of production and processing at negotiations, the Union's attempt to obtain additional information regarding the company's representations on the subject during negotiations was manifestly reasonable.[10] See *Kauai Veterans Express Co.*, 369 NLRB No. 59 at p. 10 (union legitimately requested information regarding work performed by non-bargaining unit employees after bargaining unit layoffs); *Somerville Mills*, 308 NLRB 425, 441-442 (1992), enf'd. 19 F.3d 1433 (6th Cir. 1994) (Union request for identities and locations of subcontractor firms appropriate given bargaining unit

[10] Atlantic Veal argues in its Post-Hearing Brief that the information sought by the Union was irrelevant given information provided in response to other questions the Union posed – in particular Carmody's statements that the Brooklyn facility was Respondent's only production and processing location, that Respondent had no operative locations in Ohio or Pennsylvania, and that Respondent did not intend to relocate production and processing. Post-hearing Brief at 11-12. Atlantic Veal's responses to these more specific queries, however, do not obviate the relevance of the information requested by the Union regarding how and where Respondent would obtain the product to distribute from the Morgan Avenue facility, once it was no longer being produced there by the bargaining unit employees.

employee reports of layoffs, reduction of work hours, and work "shipped out" of the facility).

Furthermore, the evidence establishes that the information requested by the Union was directly and critically pertinent to the preservation of bargaining unit work pursuant to the Union's certification as collective bargaining representative. The record establishes that the production and processing employees at the Morgan Avenue facility were encompassed in the Union's certification as collective bargaining representative issued on December 17, 2019. Jt. Ex. 1, ¶ 1; Complaint ¶ 4. Indeed, the evidence establishes that the production employees constituted the majority of the bargaining unit employees overall. Tr. 44. As a result, a complete shutdown of production and processing would likely result in the elimination of most of the bargaining unit work, and the layoff of the majority of the bargaining unit employees. The Union was therefore entitled to information regarding how Atlantic Veal would obtain the product that would be distributed from the Morgan Avenue facility – product that would otherwise have been produced and processed by the majority of the bargaining unit employees – in order to preserve bargaining unit work and maintain the integrity of the bargaining unit for which it had recently been certified. See *St. George Warehouse, Inc.*, 341 NLRB 904, 904-905, 925 (2004), enf'd. 420 F.3d 294 (3rd Cir. 2005) (information regarding agencies supplying temporary workers performing bargaining unit work, and their contractual relationships with respondent employer, relevant to newly certified union's concerns regarding "the nature and extent of the use of workers outside the unit…being used to supplant the unit work force" and consequent "erosion of the unit"); see also *Detroit Edison Co.*, 314 NLRB at 1275 (union's representational functions include "continual monitoring of any threatened incursions on the work being performed by bargaining unit members").

All of the circumstances described above also support the conclusion that the relevance of the information requested by the Union should have been apparent to Atlantic Veal as of December 2020 and January 2021, as General Counsel argues. See *Disneyland Park*, 350 NLRB at 1258; *Allison Corp.*, 330 NLRB at 1367, fn. 23. Given the impact on the bargaining unit work and employees that a closure of production and processing would entail, the fluctuating nature of Atlantic Veal's own representations regarding the closure during negotiations, and the information obtained by the Union from the bargaining employees and communicated to Respondent, the relevance of information regarding how Respondent would subsequently obtain the product it intended to distribute was obviously pertinent to the negotiations and to the Union's status as exclusive collective bargaining representative.

Finally, the evidence establishes that information requested by the Union would likely have assisted the Union in formulating and responding to bargaining proposals during negotiations. Determining the origins of the product that would be distributed from the Morgan Avenue facility after the production and processing operation ceased would have facilitated meaningful bargaining on the part of the Union. Such information would have aided the Union in evaluating whether to demand bargaining regarding the decision itself given its impact on bargaining unit work. It would also have assisted the

Union in negotiating regarding the effects of the decision on the bargaining unit employees in terms of layoffs (as it had done the previous year) and regarding possible consolidation and changes in bargaining unit work. See, e.g., *Tegna, Inc. d/b/a KGW-TV*, 367 NLRB No. 71 at p. 1-2, 13, 19-20 (information regarding subcontracting and assignment of traditional bargaining unit work to non-bargaining unit employees would assist union in formulating bargaining positions, in light of employer's proposal to remove restrictions on subcontracting and end the union's exclusive jurisdiction); *Kolkka Tables and Finnish-American Saunas*, 335 NLRB at 845, 872 (information regarding "any plans the company may have had regarding subcontracting work" relevant to newly certified union's "preparing to negotiate a collective-bargaining contract"). As a result, the evidence establishes that the requested information was likely to assist the Union in the context of collective bargaining negotiations, and was therefore necessary to the Union's performance of its duties as collective bargaining representative.[11]

For all of the foregoing reasons, the evidence establishes that information regarding the identity and location of the entities from which Atlantic Veal would obtain its product after closing the production and processing operation at the Morgan Avenue facility, requested at the December 17, 2020 negotiating session and in Sollicito's January 14, 2021 letter, was relevant and necessary to the Union's discharge of its responsibilities as collective bargaining representative. As a result, by failing to provide the Union with this information, Atlantic Veal violated Sections 8(a)(1) and (5) of the Act.

C. *The Alleged Unilateral Layoff of Bargaining Unit Employees on January 29, 2021*

The Complaint alleges that Atlantic Veal violated Sections 8(a)(1) and (5) of the Act by laying off six bargaining unit employees on January 29, 2021 – Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias – without providing the Union with notice and the opportunity to bargain regarding the layoffs or their effects, and in the absence of an overall impasse in collective bargaining negotiations. General Counsel contends that Atlantic Veal failed to provide the Union with notice and the opportunity to bargain prior to implementing the layoffs, such that the layoffs were a *fait accompli* at the time that the Union learned that they had occurred. General Counsel further argues that the layoffs were unlawful because no impasse had been reached in negotiations for an initial collective bargaining agreement, and because other unfair labor practices, namely the unlawful refusal to provide information discussed above, were unremedied at the time they took place. Atlantic Veal contends that Respondent's statements to the Union on December 17, 2020 to the effect that layoffs would occur during the first quarter of 2021 constituted sufficient notice of the January 29, 2021 layoffs, and that by failing to subsequently demand bargaining regarding the layoffs the Union waived its right to do so.

[11] Although Atlantic Veal contended in its Answer to the Complaint that the Union waived its right to obtain the information requested, Respondent does not pursue this argument in its Post-Hearing Brief. As a result I will not address it here.

It is well-settled that where employees are represented by a union, an employer violates Section 8(a)(1) and (5) of the Act by making unilateral changes with respect to mandatory subjects of bargaining, absent bargaining to impasse. *NLRB v. Katz*, 369 U.S. 736 (1962). Pursuant to Sections 8(d) and 8(a)(5) of the Act, the layoff of bargaining unit employees constitutes a mandatory subject of bargaining. See, e.g., *Thesis Painting, Inc.*, 365 NLRB No. 142 at p. 1 (2017); *Pan American Grain Co.*, 351 NLRB 1412, 1414 (2007), enf'd. 558 F.3d 22 (1st Cir. 2009). Particularly where, as here, a newly certified union is bargaining for a first contract, the prohibition against unilateral changes, and the unilateral layoff of employees in particular, "is intended to prevent the employer from undermining the union by taking steps which suggest to the workers that it is powerless to protect them:"

> Laying off workers works a dramatic change in their working conditions (to say the least), and if the company lays them off without consulting with the union and without having agreed to procedures for layoffs in a collective bargaining agreement it sends a dramatic signal of the union's impotence.

NLRB v. Advertisers Manufacturing Co., 823 F.3d 1086, 1090 (7th Cir. 1987). Consequently, an employer may not lay off bargaining unit employees without providing the union with adequate notice and the opportunity to bargain. *Sunbelt Rentals, Inc.*, 370 NLRB No. 102, at p. 5, 23-24 (2021); *Pan American Grain Co.*, 351 NLRB at 1414; *Davis Electric Wallingford Corp.*, 318 NLRB 375, 375-376 (1995).

The record evidence here establishes that Atlantic Veal did not provide the Union with notice and the opportunity to bargain prior to laying off the six bargaining unit employees on January 29, 2021. There is no evidence that any representative of Local 342 was notified before these layoffs took place, or that Atlantic Veal notified the Union directly when the layoffs were actually implemented. Instead, the evidence demonstrates that the Union learned of the layoffs from the employees themselves, who contacted Henry to inform him, and via Henry's subsequent communications with the laid off employees. The evidence thus establishes that Atlantic Veal laid off the six bargaining unit employees named in the Complaint on January 29, 2021 as a *fait accompli*, without providing the Union with notice and the opportunity to bargain. See *Stamping Specialty Co.*, 294 NLRB 703, 716 (1989) (employer failed to provide adequate notice of layoff where it did not inform union as to "when the layoff was to occur or who would be involved," information which was only provided to the employees upon their layoff, as opposed to the union).

Furthermore, the evidence overall does not establish that Carmody's statements during negotiations on December 17, 2020, January 7, 2021, and January 21, 2021 constituted effective notice of the layoffs which took place on January 29, 2021, as Atlantic Veal contends. Atlantic Veal argues that by failing to demand bargaining after Carmody's remarks in this regard, the Union waived its right to bargain with respect to the January 29, 2021 layoffs. However, Carmody's statements during these sessions described layoffs which would be engendered by a permanent closure of the production and processing component of Atlantic Veal's business, which Carmody stated on

December 17, 2020 would take place during the first quarter of calendar 2021. All of the layoffs described by Carmody and addressed by the parties at those sessions were to be effectuated, according to Carmody, in the context of the closure of the production and processing operation. However, the record establishes that production and processing was never actually closed. In fact, two of the six employees laid off on January 29, 2021 were recalled to work in late April 2021.[12] The evidence therefore does not indicate that the January 29, 2021 layoffs were related to the closure of production and processing described by Carmody during the December 2020 and January 2021 negotiating sessions – a cessation of operations that never actually occurred. As a result, Carmody's remarks at negotiations regarding layoffs in the wake of Atlantic Veal's ceasing its production and processing operations at the Morgan Avenue facility were not related to and did not constitute effective notification to the Union of the January 29, 2021 layoffs.

Atlantic Veal further argues that it provided the Union with adequate notice of the January 29, 2021 layoffs because Carmody had stated at negotiations that Respondent intended to close its production and processing operation at the Morgan Avenue facility and lay off the bargaining unit employees beginning in the spring of 2000. Because, as discussed above, production and processing never in fact closed, this argument is meritless. However, such statements would not constitute legally effective notice triggering a requirement that the Union demand bargaining in any event. Where there is an obligation to bargain, bargaining must occur "in a meaningful manner and at a meaningful time." *First National Maintenance Corp.*, 452 U.S. 666, 681-682 (1981); *Williamette Tug & Barge Co.*, 300 NLRB 282, 283 (1990) (applying *fait accompli* principle to alleged refusal to engage in effects bargaining). Adequate notice must therefore "afford the union with a reasonable opportunity to evaluate the proposals and present counter proposals" before the change is implemented. *San Juan Teachers Assn.*, 355 NLRB 172, 176 (2010), quoting *Gannett Co.*, 333 NLRB 355, 357 (2001) (bargaining regarding reduction in employee work hours). In this respect, it is well-settled that a union's obligation to request bargaining "may only be triggered by a clear announcement that a decision…has been made and that the employer intends to implement this decision." *Oklahoma Fixture Co.*, 314 NLRB 958, 960-961 (1994), enf. denied on other grounds 79 F.3d 1030 (10th Cir. 1996) (effects bargaining). An obligation to demand bargaining is not engendered by "an inchoate and imprecise announcement of future plans about which the timing and circumstances are unclear." *Oklahoma Fixture Co.*, 314 NLRB at 961 (internal quotations omitted); *San Juan Teachers Assn.*, 355 NLRB at 176; *Hospital San Cristobal*, 356 NLRB 699, 703 (2011) (no legally significant notice provided where "no date was proposed" for the elimination of permanent shifts); see also *Embarq Corp. d/b/a Centurylink*, 358 NLRB 1192, 1193 (2012) (union not required to demand bargaining "at any point before the [employer] confirmed that the decision" to eliminate retail cashier position and discharge cashiers "would be implemented on a specific date"). As the ALJ stated in *San Juan Teachers Assn.*, the Act "does not require a labor organization to demand negotiations every time

[12] These two employees were Magdaleno Garcia and Ramon Taveras Arias. Garcia is identified in an employee list prepared by Atlantic Veal as a "roll stock packer," and Taveras Arias' job title is listed as "Whizard knife." R.S. Ex. 1.

an employer mentions a potential, future change in order to avoid the risk of waiving its right to bargain under the *Katz* doctrine." 355 NLRB at 176. As a result, Atlantic Veal's communications regarding the purported closure of production and processing in the spring of 2020 did not provide the Union with legally effective notice of the January 29, 2021 layoffs.

The record evidence also establishes that the layoffs unilaterally implemented on January 29, 2021 were unlawful because the parties had not reached impasse in negotiations for an initial collective bargaining agreement, which were ongoing at the time. The parties stipulated that as of the January 29, 2021 layoffs, Atlantic Veal and the Union had not reached impasse in their collective bargaining negotiations. Jt. Ex. 2, ¶ 3. It is well-settled that in the context of negotiations for a collective bargaining agreement, an employer is required to "refrain from unilateral changes…unless and until an overall impasse has been reached on bargaining for the agreement as a whole."[13] *Bottom Line Enterprises*, 302 NLRB at 374; see also *Connecticut Institute for the Blind d/b/a Oak Hill*, 360 NLRB 359, 402-403 (2014); *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 198 (1991) (employer precluded from unilateral changes absent impasse, as "it is difficult to bargain, if, during negotiations, an employer is free to alter the very terms and conditions that are the subject of negotiations"). Thus, absent impasse, Atlantic Veal was prohibited from unilaterally implementing changes in terms and conditions of employment, including the layoff of bargaining unit employees.[14] *Wendt Corp.*, 369 NLRB No. 135 at p. 1, 5-6, 23 (2020) (employer violated Sections 8(a)(1) and (5) by laying off bargaining unit employees during negotiations for an initial collective bargaining agreement, where no impasse had been reached); *Lawrence Livermore National Security, LLC*, 357 NLRB 203, 205-206 (2011) (same).

For all of the foregoing reasons, the evidence establishes that Atlantic Veal laid off Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias on January 29, 2021 without providing the

[13] The Board has recognized two specific exceptions to this general rule, where the union "insists on avoiding or delaying bargaining," and where "economic exigencies compel prompt action" on the employer's part. *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991), enf'd. 15 F.3d 1087 (9th Cir. 1994). Atlantic Veal does not contend that either of these exceptions is applicable here.

[14] General Counsel further contends that Atlantic Veal was precluded from implementing changes in the bargaining unit employees' terms and conditions of employment given its unlawful failure to provide the information requested by the Union on December 17, 2020 and January 14, 2021, a violation which was unremedied at the time of the January 29, 2021 layoffs. However, the cases addressing unilateral changes in the wake of unremedied unfair labor practices premise the unilateral change violation on the absence of an impasse – as a result of the unremedied unfair labor practices – at the time the unilateral changes were implemented. See *Richfield Hospitality, Inc.,* 369 NLRB No. 111 at p. 2-4 (2020) ("serious unremedied unfair labor practices" which affected negotiations precluded a valid impasse such that subsequent unilateral changes were unlawful); see also *Wilshire Plaza Hotel*, 353 NLRB 304, 304-305 (2008); *Dynatron/Bondo Corp.*, 333 NLRB 750, 752-753 (2001). Because the parties have stipulated that there was no impasse in bargaining at the time of the January 29, 2021 layoffs, I need not determine whether the unremedied refusal to provide information precluded a valid impasse. See *Wilshire Plaza Hotel*, 353 NLRB at 304, quoting *Dynatron Bondo Corp.*, 333 NLRB at 752 (emphasis in original) ("[n]ot all unremedied unfair labor practices committed before or during negotiations" preclude a valid impasse, only "serious unremedied unfair labor practices that *affect the negotiations*").

Union with notice and the opportunity to bargain regarding the layoffs or the effects of the layoffs, in violation of Sections 8(a)(1) and (5) of the Act.

D. General Counsel's Request for a Remedial Notice Reading

General Counsel argues that an effective remedy for the violations in the instant cases necessarily includes an order requiring that Atlantic Veal convene a meeting of bargaining unit employees during work time where one of its responsible officials reads the Board's order aloud to the assembled employees, or in the alternative where the order is read by a Board Agent in a responsible official's presence. Tr. 24-25; Post-Hearing Brief at 32-33. Atlantic Veal does not address this issue in its Post-Hearing Brief, but argued at the hearing that such a remedy would not be appropriate in that Respondent is not a "recidivist" and the case did not involve the "hallmark violations" typically associated with a notice-reading. Tr. 25-27.

Pursuant to Board precedent, the violations established in the instant case do not rise to a level of severity which would warrant ordering that the Board's notice be read aloud in the manner requested by General Counsel. It is well-settled that a notice-reading is appropriate where the violations established "are so numerous and serious" that the remedy is "necessary to enable employees to exercise their Section 7 rights in an atmosphere free of coercion," or where the violations involved are "egregious." *Kauai Veterans Express Co.*, 369 NLRB No. 59 at p. 3, quoting *Postal Service*, 339 NLRB 1162, 1163 (2003). The violations established in this case – a refusal to provide information and the unilateral layoff of six bargaining unit employees in violation of Sections 8(a)(1) and (5) – do not rise to this standard under existing Board law. See *Kauai Veterans Express Co.*, 369 NLRB No. 59 at p. 1-3 (unlawful withdrawal of recognition, cessation of dues deduction and payments to union benefit funds, refusal to provide requested information, and polling of employees insufficient basis for ordering a notice-reading); *Queen of the Valley Medical Center*, 368 NLRB No. 116 at p. 1-2, 4 (2019) (notice-reading not warranted where employer unlawfully withdrew recognition and refused to bargain with the union, refused to provide requested information, made unilateral changes in bargaining unit terms and conditions of employment, and committed a *Weingarten* violation).

General Counsel argues that a notice-reading is appropriate based upon the Board's past award of negotiating expenses to a newly-certified union in the face of employer unfair labor practices, citing *Barstow Community Hospital*, 361 NLRB 352, 355 (2014), adopted 364 NLRB No. 52 (2016), enf'd. 897 F.2d 280 (D.C. Cir. 2018). However, the standard for awarding bargaining expenses is qualitatively different from the analysis applied with respect to a notice-reading. While an order that the Board's notice be read aloud is premised upon the atmosphere of coercion created by numerous and egregious unfair labor practices, an award of bargaining expenses is grounded in the detrimental effect of the violations committed on the parties' collective bargaining. See *Barstow Community Hospital*, 361 NLRB at 355-356, quoting *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995), enf'd. 118 F.3d 795 (D.C. Cir. 1997) (awarding negotiating expenses given that "substantial unfair labor practices have

infected the core of the bargaining process," but declining to order a reading of the notice). As a result, the line of cases awarding negotiating expenses is inapposite in the context of General Counsel's request for a remedial notice-reading here.

For all of the foregoing reasons, General Counsel's request for an order requiring that a responsible official of Atlantic Veal read the notice aloud to assembled employees on work time, or that a Board Agent read the notice aloud in a responsible official's presence, is denied.

Conclusions of Law

1. Respondent Atlantic Veal and Lamb, LLC is an employer engaged in commerce at its 275 Morgan Avenue, Brooklyn, New York facility within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Food & Commercial Workers Union, Local 342 ("Local 342") is a labor organization within the meaning of Section 2(5) of the Act.

3. Since December 17, 2019, Local 342 has been the certified collective bargaining representative of Respondent's full-time and regular part-time processing and warehouse employees including wrappers, packers, meat cutters, sanitation, mechanics, maintenance, freezer, shipping, and receiving employees employed by the Respondent, excluding all clerical employees, managers, agency employees, sales employees, professional employees, quality control employees, guards and supervisors as defined by the National Labor Relations Act.

4. Respondent failed and refused to bargain in good faith with Local 342 by refusing to provide the Union with information requested on December 17, 2020 and in Louis Sollicito's letter dated January 14, 2021 necessary for the Union to fulfill its responsibilities as exclusive collective bargaining representative, in violation of Sections 8(a)(1) and (5) of the Act.

5. Respondent laid off Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias on January 29, 2021 without providing the Union with notice and the opportunity to bargain regarding the layoffs or the effects of the layoffs, in violation of Sections 8(a)(1) and (5) of the Act.

6. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the Act's policies. Specifically, having found that Respondent violated Sections 8(a)(1) and (5) of the Act by refusing to provide the Union with information

necessary for the Union's discharge of its functions as collective bargaining representative, I will order that Respondent provide the Union with the information requested. Having further found that Respondent violated Sections 8(a)(1) and (5) by laying off six bargaining unit employees without providing the Union with notice and the opportunity to bargain, I shall order Respondent to notify and, on request, bargain collectively and in good faith with the Union before implementing any changes in wages, hours, or other terms and conditions of employment. I shall also order Respondent to offer the six bargaining unit employees that were laid off full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed. In addition, I shall order the Respondent to make each of these employees whole for any losses sustained as a result of its unlawful conduct, in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (6th Cir. 1971), with interest at the rate as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Respondent shall also be ordered to compensate these employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director, Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year, pursuant to *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). Respondent shall be further ordered to remove from its files any references to the unlawful layoffs of the six bargaining unit employees, and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. Respondent shall be further ordered to remove from its files any references to the unlawful layoffs of the six bargaining unit employees, and to notify them in writing that this has been done and that the unlawful actions will not be used against them in any way. Finally, I shall order Respondent to post and disseminate an appropriate notice.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended:

Order[15]

Atlantic Veal and Lamb, LLC, its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with United Food & Commercial Workers Union, Local 342, by refusing to provide information requested by the Union on December 17, 2020 and January 14, 2021, which is necessary for the Union to perform its functions as exclusive collective bargaining representative of the employees in the following appropriate bargaining unit:

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

All full-time and regular part-time processing and warehouse employees including wrappers, packers, meat cutters, sanitation, mechanics, maintenance, freezer, shipping, and receiving employees employed by the Respondent, excluding all clerical employees, managers, agency employees, sales employees, professional employees, quality control employees, guards and supervisors as defined by the National Labor Relations Act.

(b) Changing the terms and conditions of employment for bargaining unit employees without first notifying the Union and providing the Union with the opportunity to bargain regarding the changes and their effects.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Provide Local 342 with the information requested at the December 17, 2020 negotiating session and in Louis Sollicito's January 14, 2021 letter regarding the origins of the product which will distributed via the 275 Morgan Avenue facility in the event that the production and processing operation at that location is closed.

(b) Within 14 days from the date of this Order, offer Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias full reinstatement to their former jobs or to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(c) Make whole Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias for any loss of earnings and other benefits suffered as a result of their unlawful layoffs, in the manner set forth in the remedy section above.

(d) Compensate Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(e) Within 14 days of the date of this Order, remove from its files any reference to the unlawful layoffs of Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias, and within 3 days

thereafter notify the employees that this has been done and that the unlawful layoffs will not be used against them in any way.

(f) Within 14 days after service by the Region, post at its facility in Brooklyn, New York, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. If Respondent has gone out of business or closed the Brooklyn, New York facility, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since January 1, 2021. Notices shall be posted and otherwise disseminated in English and Spanish.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

(h) Within 21 days of the date the amount of backpay is fixed either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, file with the Regional Director for Region 29 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

Dated, Washington, D.C. February 15, 2022

Lauren Esposito
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain in good faith with United Food & Commercial Workers Union, Local 342, by failing and refusing to provide the Union with information necessary for the Union to perform its duties as the exclusive collective bargaining representative of our employees in the following bargaining unit:

All full-time and regular part-time processing and warehouse employees including wrappers, packers, meat cutters, sanitation, mechanics, maintenance, freezer, shipping, and receiving employees employed by the Respondent, excluding all clerical employees, managers, agency employees, sales employees, professional employees, quality control employees, guards and supervisors as defined by the National Labor Relations Act.

WE WILL NOT lay you off or otherwise change your terms and conditions of employment without first providing the Union with notice and the opportunity to bargain over the layoffs or other changes, and their effects.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL provide the Union with the information requested at the December 17, 2021 negotiating session and in Louis Sollicito's January 14, 2021 letter regarding the origins of the product which will be distributed from the 275 Morgan Avenue facility if the production and processing operation at that location is closed.

WE WILL within 14 days from the date of the Board's order, offer Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias full reinstatement to their former jobs or to substantially

equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make whole Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias for any loss of earnings and other benefits suffered as a result of their unlawful layoffs.

WE WILL compensate Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 29 a copy of corresponding W-2 forms for Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias reflecting their backpay awards.

WE WILL within 14 days of the date of the Board's order, remove from our files any reference to the unlawful layoffs of Leandro A. Alava Santos, Magdaleno Garcia, Alfredo C. Perez, Osvaldo Sandoval, Juan Santana, and Ramon Taveras Arias, and WE WILL within 3 days thereafter notify them in writing that this has been done and that the unlawful layoffs will not be used against them in any way.

ATLANTIC VEAL AND LAMB, LLC

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Two Metro Tech Center, 100 Myrtle Avenue, Suite 5100, Brooklyn, NY 11201-3838

(718)330-7713, Hours: 8:30 a.m. to 5:00 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/29-CA-272677 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (718)765-6190.